INDEXED AS: KENNIBAR RESOURCES LTD. v. THE MINISTER OF ENERGY AND MINES FOR THE PROVINCE OF SASKATCHEWAN and GULF CANADA RESOURCES LIMITED

FILE NO: Q.B.M. 843/90 **J.C. R.**

JUDGE: SCHEIBEL J. **DATE:** OCTOBER 26, 1990

KEYWORDS (Can. Abr.(2d) categories plus):

- Administrative Law; Judicial Review
- Oil and Gas; Statutes

STATUTE, SECTION OR RULE CONSIDERED:

- *The Oil and Gas Conservation Act*, R.S.S. 1978, c. O-2, ss. 3, 25, 26, 49 and 50

SUMMARY:

The applicant applies to quash an order of the Minister of Energy and Mines permitting Gulf Oil to drill a horizontal oil well without restricting the size of the well or a cap being placed on its production, common to all vertical wells. The applicant alleges in doing so the Minister contravened the Act and further the Minister failed to give the applicant a hearing and contravened the rules of natural justice.

HELD: The Minister made an error of law in interpreting the Act. The order must be quashed by virtue of the error. Also, the failure to grant a hearing renders the Minister's order invalid as a breach of natural justice.

CITE ANY SASK. Q.B. CASES FOLLOWED, DISTINGUISHED OR CONSIDERED:

Gladstone Petroleum Ltd. v. Husky Oil (Alberta) Ltd., [1982] 6 W.W.R. 577 (Sask. C.A.);
Re Datta and Saskatchewan Medical Care Insurance Commission and two other appeals (1987), 33 D.L.R. (4th) 507 (Sask. C.A.);
Misra v. College of Physicians and Surgeons of Saskatchewan et al. (1988), 36 Admin. L.R. 298 (Sask. C.A.);
Baiton Enterprises Ltd. v. Liquor Licensing Commission and Attorney General for Saskatchewan, [1985] 1 W.W.R. 186;
Hawrish v. Cundall et al. (1989), 39 Admin. L.R. 255

Q.B.M.
No. 843

A.D. 1990
J.C. R.

IN THE QUEEN'S BENCH

JUDICIAL CENTRE OF REGINA

BETWEEN:

KENNIBAR RESOURCES LTD.

APPLICANT

- and -

THE MINISTER OF ENERGY AND MINES FOR THE PROVINCE OF SASKATCHEWAN and GULF CANADA RESOURCES LIMITED

RESPONDENTS

L. B. LeBlanc and J. M. Lee	for the applicant, Kennibar Resources Ltd.
G. J. Moran	for the Minister of Energy and Mines for the Province of Saskatchewan
P. N. McDonald	for Gulf Canada Resources Limited

JUDGMENT
October 26, 1990

SCHEIBEL J.

This is an application by Kennibar Resources Ltd. (the "applicant") for an order pursuant to Rules 664 and 668 of the Queen's Bench Rules, quashing an order of the respondent, The Minister of Energy and Mines for the Province of Saskatchewan (the

"Minister") granted under *The Oil and Gas Conservation Act*, R.S.S. 1978, c. O-2 (the "OGCA") dated July 26, 1990 and designated as MRO 94/90.

ISSUES

This application raises the following issues:

(a) Has the Minister, in making the decision to issue the impugned order, committed a reviewable error of law?

(b) In making his decision to issue the impugned order, has the Minister exceeded or lost his jurisdiction by reason of having exercised his discretion under the OGCA in an arbitrary, unreasonable or discriminatory manner?

(c) In discharging his statutory function under the OGCA to regulate the maximum rate at which an oil well may be permitted to produce, to what extent is the Minister subject to a common law duty to adhere to the principles of natural justice and procedural fairness?

(d) What are the specific requirements of natural justice and procedural fairness governing the Minister's decision-making process in view of:

(i) the legislative context of the OGCA; and
(ii) the nature of the rights and interests affected by the Minister's decisions?

(e) In making his decision to issue the impugned order:

(i) was the Minister bound to adhere to the specific principle of natural justice known as the "*audi alteram partem*" rule; and

(ii) if he was so bound, to what extent did he comply with this principle of natural justice?

(f) If, in making his decision to issue the impugned order, the Minister was bound to comply with the "*audi alteram partem*" rule but failed to do so, is it of any consequence to the validity of his decision:

(i) that there was no oil and gas conservation board then in existence to conduct a formal hearing; or

(ii) that his decision may have been the same, even if he had complied with the "*audi alteram partem*" rule?

FACTS

The applicant owns and operates nine vertical producing oil wells in the vicinity of Carlyle which are located in an underground reservoir known as the "Ingoldsby Frobisher-Alido Beds Pool" (the "pool").

All producers seeking to commence production from new oil wells are required to apply to the Department of Energy and Mines of the Government of Saskatchewan (the "Department"), for a "maximum permissive rate" (also known as "an MPR" or "an allowable") in respect to each new oil well.

In accordance with s. 65 of *The Oil and Gas Conservation Regulations, 1985*, R.R.S. c. O-2 Reg. 1 (the "OGC Regulations"), the MPR which is assigned to a particular oil well by the Department, determines the amount of oil that can be produced from that oil well in any given month.

The MPR for each oil well is calculated in accordance with the order of the

Minister dated October 23, 1986, and designated MRO 112/86 A 67. This order provides a complex mathematical equation by which the MPR is calculated and takes into consideration factors such as the area of the drainage unit of the oil well and the thickness of the "pay zone" or production portion of the reservoir in which the oil well is situated.

In continuous oil reservoirs with a high degree of permeability, unrestricted production from a particular oil well in a pool can result in drainage of oil and other reservoir fluids from adjacent or offsetting oil wells located in the same pool.

In an attempt to avoid or minimize drainage of offsetting oil wells, government petroleum regulatory agencies have placed restrictions on oil well spacing and target areas and have imposed MPRs or maximum permissive rates on individual oil wells. The penalty for overproduction could result in the well being shut in or sealed until the overall production is brought into line with that which is authorized.

It is through the operation of these conservation measures that the regulatory agencies attempt to conserve the oil resources, maximize ultimate recovery therefrom, prevent damage to oil reservoirs; and to protect the *inter partes* rights of neighbouring and competing owners and operators (known within the industry as "correlative rights").

The conventional type oil well drilled in this area is described as a "vertical well". In recent years the industry has developed a new form of oil well technology known as "horizontal well drilling". This technology contemplates the drilling and development of wells in a horizontal direction so as to establish a highly deviated or horizontal flow of fluid.

It is widely accepted within the oil industry, that all factors being equal, the productivity of horizontal wells is several times greater than that of vertical wells. This is a result of the physical advantages of horizontal well technology over that of the vertical well.

The phrase "Good Production Practice" ("GPP") has been adopted by Saskatchewan from the Alberta industry even though there is no statutory recognition for the classification or concept in this province.

The phrase GPP is defined in the publication *Petroleum Industry Terminology--A Glossary of Terms in Common Use in the Industry* (Petro-Canada, September, 1987) as:

> A production classification defined under the Alberta Proration Plan which permits designated pools or wells to be produced at unrestricted rates which do not adversely affect conservation, the prevention of waste and the opportunity for each owner to obtain a fair share of production. Normally, designated pools/wells are older with stable production histories and having capabilities less than the calculated allowable.

Despite the absence of statutory authority in Saskatchewan for the classification GPP, the Minister has, on occasions, classified wells as such. Wells so classified are allowed to regulate their own levels of production and are permitted to produce oil without regard to production limits. That is, there is no MPR or allowable assigned to a well which has been granted GPP status. Generally speaking those assigned GPP status are so designated with the consent of the owners of offsetting or adjacent wells.

On May 14, 1990 Gulf Canada Resources Limited ("Gulf") applied to the Minister for permission to drill and develop a horizontal well in the pool which was to traverse certain legal subdivisions. At the same time Gulf requested GPP status for this well in order to regulate its own production levels without the restrictions common to vertical wells including those of the applicant.

In its application, Gulf claimed the only wells which might be impacted by the horizontal well were those owned by Gulf. That is there would be no drainage in

respect of other wells not owned by Gulf.

Copies of the Gulf application were sent to the oil producing competitors in the immediate area including the applicant, Shell Canada and Placid Oil Company. In the application Gulf invited the Minister's office to contact Gulf directly should additional information be required.

The applicant claims four of its wells, which are in close proximity to Gulf's horizontal well, are being impacted by the Gulf well in that drainage into the horizontal well is occurring.

In its application Gulf predicted the horizontal well would have a recovery factor rate of 35% as compared to 25% in vertical wells. They further stated the drainage area of the proposed well would be similar to that of two particular vertical wells in the area and estimated flow rates would be in the area of 60.0 ^{M3} per day. It was estimated the $1,015,000.00 cost of the well would be paid out in seven months of production.

On May 17, 1990 the Minister's office gave public notice of the Gulf application and requested objections to be sent in writing by June 15, 1990. On May 28, 1990 the applicant wrote to the Minister's office supporting Gulf's application to drill the horizontal well but objected to the request that the well be accorded GPP status. The applicant specifically referred to s. 3(c) of the OGCA which requires the Department to "protect the correlative rights of each owner" and complained that an assigned GPP status would allow Gulf to unfairly capture oil from offsetting owners through migration of reservoir fluids and thereby contravene s. 3(c).

The applicant requested Gulf be assigned the MPR equivalent of two other vertical wells in the area which, according to their calculation, would allow production at approximately 30 ^{M3} per day for the horizontal well.

On June 27, 1990 T.D.L. Petroleums Inc. wrote to the Department and complained about the proposed GPP status for the well. T.D.L. was advised its complaint was made after the deadline given in the public notice and that it would receive no consideration.

On July 13, 1990, and notwithstanding the opposition of the applicant and that of T.D.L., the Minister issued a document entitled "Minister's Approval" (MA 82/90) whereby the Minister approved Gulf's application and granted it GPP status. This approval reduced the horizontal length of the well from a proposed 845 meters to 695 to provide a greater distance from the end sections of the well to the applicant's lease lines. The Minister's office advised Gulf that if there was "obvious interference" with other vertical wells the GPP status would be rescinded and a MPR would be assigned.

On July 18, 1990 the applicant, through its solicitors, applied to the Minister, pursuant to s. 50 of the OGCA for a hearing by the Oil and Gas Conservation Board in respect to the Gulf well being accorded GPP status.

On July 26, 1990, without granting the applicant a hearing, the Minister rescinded MA 82/90 and replaced it with the order which is now sought to be quashed.

The impugned order provides:

MINISTER'S ORDER MRO 94/90

Under The Oil and Gas Conservation Act

Ingoldsby Frobisher-Alida Beds Pool

Horizontal Well Project and Good Production Practice

Minister's Approval MA 82/89, dated July 13, 1990 is rescinded, and replaced by the following order.

The application submitted by Gulf Canada Resources Limited

to conduct a horizontal well project in the Ingoldsby Frobisher-Alida Beds Pool is approved pursuant to The Oil and Gas Conservation Act, and permission is granted to construct the facilities and to drill and complete one well with a proposed 695 metre horizontal section in the Frobisher-Alida Beds underlying legal subdivisions 11 and 13 of Section 3, in Township 4, in Range 31, West of the First Meridian, in accordance with plans and specifications filed with Saskatchewan Energy and Mines as document No. H.W. 22 and subject to the following provisions:

1. The horizontal well shall not be subject to the provisions of Minister's Order MR0 151/89 PO 27 regarding the drilling of and production from oil and gas wells in the Ingoldsby Frobisher-Alida Beds Pool, but shall be subject to the provisions of this Order.

2. The horizontal well shall have a drainage unit common to the existing vertical wells, consisting of legal subdivisions 11, 12, 13 and 14 of Section 3 in Township 4, in Range 31 West of the First meridian.

3. The horizontal well shall not be subject to the provisions of MRO 112/86 A 67, but shall be produced according to Good Engineering and Production Practice.

4. Annual progress reports for the project shall be submitted to the Engineering Services Branch of Saskatchewan Energy and Mines.

5. For a period of 12 months following the first production date of the horizontal well, the applicant shall provide monthly production data to the Engineering Services Branch of Saskatchewan Energy and Mines, on or before the fifteenth day of the following month. This will be in addition to normal production reporting requirements.

6. The Department will monitor production from the horizontal well and from the following wells:

   B A McMillen 6-3-4-31
   Placid Nottingham 7-3-4-31

Kennibar et al Ingoldsby 10-3-4-31
TDL Ingoldsby 16-4-4-31
Kennibar et al Ingoldsby 1-9-4-31
Kennibar et al Ingoldsby 4-10-4-31.

If, as a result of this monitoring, or due to a submission from the operator of a well adjacent to the horizontal well, the Minister is satisfied that inequitable drainage of oil is occurring, provision 3 shall be rescinded and a numeric maximum permissible rate will be established for the horizontal well.

Dated at Regina, Saskatchewan, July "26", 1990

"Bruce W. Wilson
for" John Reid, Deputy Minister
Saskatchewan Energy and Mines

The applicant was not satisfied with the minor changes contained in the impugned order. By letter dated August 27, 1990, the applicant made a second application to the Minister, pursuant to s. 50 of the OGCA, for a hearing by the OGCA Board in respect to the GPP status assigned to the Gulf well. Nothing further was done by the Minister and by letter dated September 17, 1990 from the Minister, the second request for a hearing was denied.

The Gulf horizontal well was drilled and put on production in early September 1990. This well, as of October 1, 1990, was producing 146.5 ^{M3} or 923 barrels per day. This is substantially in excess of Gulf's estimate and four to five times greater than those vertical wells referred to by the applicant and which are subject to the MPR restriction.

PRELIMINARY MATTERS

Counsel for the applicant claims several paragraphs in the affidavits filed by the Respondent contravene Queen's Bench Rule 319. This rule provides "affidavits shall

be confined to such facts as the witness is able, of his own knowledge to prove, except on interlocutory motions".

An application for judicial review is a final application, therefore there must be compliance with the rule. I do not take into account those portions of the affidavits which contain hearsay and are therefore in breach of the rule.

There are numerous conflicting affidavits filed with respect to the issue of drainage. The applicant's position is that drainage is occurring and the respondents say it is not. This issue cannot be resolved on the basis of conflicting affidavits and no finding is made in this respect.

The applicant raises the status of the Minister to argue issues other than its jurisdiction to make the order in question. Counsel for the Minister agrees that it is not appropriate for the Minister to appear before this Court to argue the correctness of his decision. I agree with counsel in this submission.

The role of the Minister has been set out by the Supreme Court of Canada in *Northwestern Utilities Limited and The Public Utilities Board of the Province of Alberta v. The City of Edmonton*, [1979] 1 S.C.R. 684. At p. 709 Estey J. states:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction . . . .
>
> In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily

contemplated in our judicial traditions.

See also *Cashin v. Canadian Broadcasting Corporation et al.* (1985), 8 Admin.L.R. 161 (Fed. C.A.).

ERROR OF LAW

It has been well established that error of law is a ground for certiorari. The OGC Regulations do not contain a privative clause, however, even if there was a privative clause it would not preclude a judicial review. Where there is a privative clause the scope of review is restricted and the courts adopt a posture of deference and interfere only for jurisdictional error. This is clear from the statement of LaForest J. in *C.A.I.M.A.W. v. Paccar of Can. Ltd.*, [1989] 6 W.W.R. 673 (S.C.C.) at p. 692:

> Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the board if that board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function. . . .

Lengthy arguments were advanced by the applicant and the respondent as to which test is to be applied to the Minister's order. The respondents argue, absent a privative clause, the test to be applied is one of a patently unreasonable standard. The applicant claims it is the correctness test and that the Minister's order can be set aside for mere error of law.

It appears to me from the cases cited by counsel that this issue, that is the extent to which the courts should intervene and alter substantive decisions, has defied final judicial determination.

The OGCA, by virtue of s. 5, is to be administered by the Department. Section 6 of the Act provides "for the purpose of effectuating the purposes of this Act,

the minister . . . may make or issue orders and take any other action he deems necessary or expedient for or incidental to the performance, execution and carrying out of any duty, function or power imposed or conferred upon him by this Act".

Central to the applicant's argument under this heading of error of law are ss. 3 (c), (d) and 25 of the OGCA. The relevant portions of which are:

> 3 The purposes of this Act are:
>
> (a) to prevent waste;
>
> (b) to regulate all operations for the production of oil and gas in such manner that the greatest possible ultimate recovery thereof by prudent and proper operations and practices may be realized;
>
> (c) to protect the correlative rights of each owner;
>
> (d) to enable each owner to obtain his just and equitable share of the allowable production of any pool. . . .
>
> 25 The minister shall by order establish drainage units of uniform size and shape for a field or pool, provided that, where he deems it to be necessary by reason of differences in the character of the formation, the minister may divide a pool into zones and establish drainage units for each zone, and the drainage units in a zone may differ in size and shape from those in another zone. [emphasis added]

It is argued any action taken by the Minister which is inconsistent with the purposes of the OGCA would amount to an error in law. With respect to s. 3, the applicant claims the Minister, in approving the Gulf horizontal well with GPP status, failed "to protect the correlative rights of" the applicant and failed "to enable each owner to obtain his just and equitable share of the allowable production of any pool".

On the other hand, Gulf takes the position, by virtue of ss. 3(a) and (b) of the Act, that the Minister may pursue avenues which will produce "the greatest possible

ultimate recovery" even at the expense of perfect equity among adjoining owners. In support of this is cited *Gladstone Petroleum Ltd. v. Husky Oil (Alberta) Ltd.*, [1982] 6 W.W.R. 577 (Sask. C.A.). The Court approved the statement of the trial judge, Halvorson J., at p. 598-9 where he stated:

> I do not read ss. 3 and 35 as obligating the cabinet to assure that the respective owners receive their precise shares of production. The cabinet must also have in mind the factors of waste and maximum ultimate recovery. Public policy becomes a consideration, and in some instances it may transcend the interests of the participating parties. It can be appreciated that it may not always be compatible to protect fully the rights of the owners, and at the same time prevent waste and attain optimum production.

I have already indicated it is not possible to make a finding, on this application, in respect of drainage. If there is no drainage, then there is no interference with the correlative rights of the applicant, nor is there any interference with the applicant obtaining its just and equitable share of the allowable production. On that basis, the action taken by the Minister is not inconsistent with the OGCA, and there is no error of law in respect to s. 3 of the OGCA.

The second argument of the applicant under this heading is that the Minister, by assigning Gulf's horizontal well a drainage unit comprising four legal subdivisions, is in violation of s. 25 of the OGCA.

Section 2(1)(d) of the OGCA defines "drainage unit" as "the area allocated to a well for the purposes of drilling for and producing oil or gas . . . ."

In the Minister's order MRO 151/89 PO 27, in respect to this pool, the Minister ordered all "drainage units for the drilling and completion of an oil well shall be comprised of one legal subdivision in a section".

In response to this argument Gulf refers to s. 26 of the Act which provides:

> The size and shape of drainage units shall be such as will result in the efficient and economical development of the field or pool as a whole, and the size shall not be smaller than the maximum area that can be efficiently drained by one well. [emphasis added]

Gulf argues that it is evident from s. 26 that the purpose of drainage units is to limit or restrict the number of wells in a pool and claims it subverts the intention of the drainage unit concept to suggest that an order is improper because the drainage unit is too large. It claims the object of the drainage unit provisions is to keep wells as far apart as possible in the interest of efficiency and economy.

In addition Gulf states the size of a drainage unit *per se* is of no consequence to an adjoining owner in terms of correlative rights. It contends it is only if a restriction on the production rate is derived from the size of an assigned drainage unit, that the drainage unit has any bearing on correlative rights. Therefore it states, it is the production rate that involves the correlative rights of the applicant and not the size of the drainage unit.

It is further argued that s. 26 is operative and the maximum area that can be efficiently drained by a horizontal well is many times that of a conventional vertical well. Therefore, it is suggested, the reference to "uniform size" in s. 25 must be read in terms of assumed uniformity in the drainage capacity of wells. To do otherwise, it is argued, would result in an inconsistency between the two sections.

In the final analysis Gulf claims s. 25 does not preclude the assignment of four legal subdivisions to the drainage unit because, if wells were limited to one legal subdivision, then you could not drill a horizontal well longer than the one subdivision. This would effectively eliminate the drilling of horizontal wells.

In respect to the final position of Gulf, the answer must be found in the legislation and regulations and not on what might be best for certain parties in the

industry. The fact that horizontal wells may not be practical or economical if confined to one legal subdivision is no answer where they are so restricted by legislation.

It is clear from the arguments advanced by all parties that horizontal drilling is a relatively new technology in this province. The legislation in place does not contemplate issues arising from this technology and the problem lies in the failure of the Act and the Regulations to keep pace with the new advances in the industry.

By virtue of s. 25 of the Act it is mandatory for the Minister, by order, to establish drainage units which are uniform in size and shape for each pool. In compliance with this mandatory direction, the Minister, in respect of this "pool", ordered the uniform size and shape of the subject drainage unit be comprised of one legal subdivision.

This is also consistent with the regulations passed pursuant to the Act. Section 27(1)(d) of the OGC Regulations reads:

> Subject to subsections (3) and (4), the drainage unit of an oil well:
>
> > (a) in a territory surveyed into sections . . . is one legal subdivision . . . .

Subsections (3) and (4) state:

> (3) If, in the minister's opinion, there is more than one productive zone, he may consider each productive zone separately for the purpose of establishing drainage units.
>
> (4) The minister may, after public notice, issue an order prescribing drainage units other than those provided for in subsections (1) and (2).

There is nothing before me to indicate the Minister was of the opinion there "is more than one productive zone" therefore s. 27(3) of the OGC Regulations does not

apply.

With respect to s. 27(4) of the OGC Regulations it is argued that the Minister gave public notice and prescribed a drainage unit other than that of one legal subdivision. The difficulty with this argument is that by virtue of s. 25 of the Act all drainage units for the entire "pool" must be of uniform size and shape. The only time s. 27(4) can be invoked is where all of the drainage units in the "pool" are changed to a different uniform size and shape. Clearly this was not done because the size of the drainage unit remained at one legal subdivision for all wells with the exception of the Gulf horizontal well.

On examining paragraph 2 of the impugned order, it is noted that "the horizontal well shall have a drainage unit common to the existing vertical wells, consisting of "four legal subdivisions". This portion of the order appears on its face to be contradictory. If the drainage unit common to vertical wells is one legal subdivision four legal subdivisions cannot be assigned to the horizontal well.

The argument by Gulf as to the effect of s. 26 has, in my opinion, no merit. I am of the view that s. 26 must be read as placing a limitation on the size and shape of the drainage unit which will result in the most efficient and economical development of the entire "pool". This drainage unit, by virtue of s. 25, must be uniform in size and shape for the entire "pool". In assigning four legal subdivisions to the Gulf well, the Minister committed an error of law on the face of the record.

Is this error reviewable by the Courts? In *The Board of Industrial Relations of the Province of Alberta and Sheet Metal Auto Body, Motor Mechanics, and Allied Production Workers, Local No. 414, Edmonton, Alberta v. Stedelbauer Chevrolet Oldsmobile Ltd.*, [1969] S.C.R. 137 at 143 Martland J. states:

> In my opinion, such a review can be made, not only on a question of jurisdiction, but in respect of an error of law on the face of the record. That *certiorari* would issue to quash the decision of a statutory administrative tribunal for an error of law

> on the face of the record, although the error did not go to jurisdiction, was clearly stated in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [[1951] 1 K.B. 711; arrpoved, on appeal, [1952] 1 K.B. 338]. That case was referred to by Kerwin J. (as he then was) in *Toronto Newspaper Guild v. Globe Printing Company*, [[1953] 2 S.C.R. 18 at 24].

The Supreme Court came to a similar conclusion in *Yellow Cab Ltd. v. Board of Industrial Relations, A. Sadownik, B. Dunbeck, Alberta Union of Provincial Employees and Yellow Cab Drivers' Association*, [1980] 2 S.C.R. 761 and held the court is clothed with authority to grant *certiorari* if there is an error of law on the face of the record.

In *Denis Blanchard v. Control Data Canada Limited and Jean-Paul Lalancette*, [1984] 2 S.C.R. 476 Lamer J. held at p. 495:

> In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal. I hasten to add that the distinction between an error of law and one of fact is still entirely valid when the tribunal is not protected by a privative clause. Indeed, though all errors of law are then subject to review, only unreasonable errors of fact are, but no others.

See also *Calco Club et al. v. Director of Employment Standards Branch* (1985), 41 Alta. L.R. (2d) 178 and *Clay v. Bd. of Reference* (1986), 45 Alta. L.R. (2d) 229.

This issue was dealt with at length in *P.(N.P.) v. Regional Children's Guardian* (1988), 59 Alta. L.R. (2d) 289. D. C. McDonald J. held in the absence of a statutory privative clause, other than the case of consensual arbitration, the availability of judicial review is not restricted to cases where the decision is patently unreasonable. He went on to say the Courts' power of review for error of law extends to all errors of law.

In *Re Datta and Saskatchewan Medical Care Insurance Commission and two other appeals* (1987), 33 D.L.R. (4th) 507 (Sask. C.A.) Bayda C.J.S., for the majority, stated at pp. 525-526:

> . . . It has been authoritatively settled that where a statutory body not subject to a privative clause . . . makes a mere error of law, a decision resulting from that error is reviewable even though the statutory body does not lose jurisdiction by reason of that error.

The respondents claim curial deference should be accorded to the Minister's order. That is, the Court should not review or interfere with the decision of the Minister where the Minister is acting within the area of expertise of his Department, unless the decision rendered is in excess of the Minister's jurisdiction. In my opinion, the Minister in interpreting the statutory provisions of the OGCA is deciding an issue which is outside the area of expertise of the Minister and his Department. The question under consideration does not fall within the special or core jurisdiction given to the Minister.

As I understand the law in this area, absent a privative clause, the Courts may exercise their discretion and scrutinize the correctness of the Minister's decision.

The Court might refrain from correcting the error where it is clear from the Act that the Legislature intended to give exclusive or final jurisdiction for questions of law to the agency, so long as it remains within its jurisdiction. The OGCA contains no such provision and none can be inferred.

In my opinion, the issue of curial deference does not arise in this case. This matter is confined to the statutory interpretation to be given to the legislation in question. When interpreting the OGCA the Minister must be correct. A decision resulting from an error in law by the Minister is reviewable by the Courts.

NATURAL JUSTICE

Common Law Duty to Adhere to the Principles of Natural Justice

There now exists a broadly based common law principle under which every

public authority who makes a decision affecting the rights, privileges or interests of an individual must adhere to the requirements of natural justice or procedural fairness. this principle applies to judicial, quasi-judicial or administrative decisions.

In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police and Attorney-General for the Province of Ontario*, [1979] 1 S.C.R. 311, Laskin C.J.C., in considering an appeal by a probationary police constable who had been dismissed without a hearing, offered the following statements of the common law duty of procedural fairness (at 324-325):

> . . . I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in *Bates v. Lord Hailsham*, [[1972] 1 W.L.R. 1373], at page 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".
>
> The emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice has been commented on in de Smith, *Judicial Review of Administrative Action, supra*, at page 208, as follows:
>
> > That the donee of a power must "act fairly" is a long-settled principle governing the exercise of discretion, though its meaning is inevitably imprecise. Since 1967 the concept of a duty to act fairly has often been used by judges to denote an implied procedural obligation. In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative. . . .
>
> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L.J. 281.

In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 Dickson J. (as he then was) reviewed the common law authorities and offered the following summary (at 628-629):

> The authorities, in my view, support the following conclusions:
>
> 1. *Certiorari* is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.
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> 2. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum. That is what emerges from the decision of this Court in *Nicholson*. In these cases, an applicant may obtain *certiorari* to enforce a breach of the duty of procedural fairness.
>
> . . . The fact that a decision-maker does not have a duty to act judicially, with observance of formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly which involves importing something less than the full panoply of conventional natural justice rules. In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.

(at 630-631):

> 7. It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each. In *Nicholson*, the Chief Justice spoke of a ". . . notion of fairness involving something less than the procedural protection of traditional natural justice". Fairness involves compliance with only some of the principles of natural justice. Professor de Smith (3rd edition, 1973, page 208) expressed lucidly the concept of a duty to act fairly:
>
> > In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative.
>
> The content of the principles of natural justice and fairness in application to individual cases will vary according to the circumstances of each case, as recognized by Tucker L. J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109, at page 118.
>
> 8. In the final analysis, the simple question to be answered is this: did the tribunal on the facts of the particular case act fairly towards the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness. [emphasis added]

In his decision the following year in *Homex Realty and Development Company Limited v. Village of Wyoming*, [1980] 2 S.C.R. 1011, Dickson J. (as he then was) expounded upon this concept of a broad spectrum of administrative decisions (at 1051-1052):

> In *Martineau*, it was said that review by *certiorari* was available whenever a public body has power to decide "any matter affecting the rights, interest, property, privileges or liberties of any person" (at page 628). Once it is clear that

> rights are being affected, it is necessary to determine the appropriate procedural standard that must be met by the statutory body. Above all, flexibility is required in this analysis. There is, as it were, a spectrum. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual little or no procedural protection. See *Re Braeside Farms Ltd. et al and Treasurer of Ontario et al* (1978), 20 O.R. (2d) 541 (Ont. Div. Ct.). On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards, particularly when personal or property rights are targeted, directly, adversely and specifically. [emphasis added]

In *Homex, supra,* the corporation of a village enacted a municipal bylaw which rescinded subdivision approval previously given to a real estate developer. The village argued that an overriding "public policy" component to its decision ousted any suggestion of natural justice. Dickson J. strongly rejected such argument in the following terms at p. 1050:

> Second, the presence of a compelling public interest does not alone abrogate or diminish a citizen's right to procedural protection. The private property interests of *Homex* were here at stake. The public interest, it seems to me, is best served by affording the private interest full disclosure and a fair opportunity to be heard. There is no [sic] *a priori* reason why the private interest should yield abjectly to the public interest. The Village could undoubtedly pass a bylaw such as No. 7 if it is in the public interest but, prior to deciding in favour of the public interest, the Council should hear the land owner's submissions. One cannot label an act "legislative" for the purpose of dispensing with fairness. A bylaw may, in the public interest, operate to the detriment of particular individuals but not without giving those individuals a right of hearing. [emphasis added]

See also *Cardinal and Oswald v. Director of Kent Institution,* [1985] 2 S.C.R. 643 at 653; *Misra v. College of Physicians and Surgeons of Saskatchewan et al.* (1988), 36 Admin. L.R. 298 (Sask. C.A.); *Baiton Enterprises Ltd. v. Liquor Licensing Commission and Attorney General for Saskatchewan,* [1985] 1 W.W.R. 186 and *Hawrish v. Cundall et al.* (1989), 39 Admin. L.R. 255.

When one determines whether the principles of natural justice and procedural fairness apply, it is of no moment that the public authority making a decision under a statute is a Minister of the Crown. It is clear that ministerial status of the public authority does not oust the duty of procedural fairness in respect of such decision. (See *Errington and Others v. Minister of Health*, [1935] 1 K.B. 249 (C.A.); *Padfield v. Minister of Agriculture, Fisheries and Food and Others*, [1968] A.C. 997 (C.A.) *aff'd* [1968] A.C. 1016 (H.L.); *Re Multi-Malls Inc. et al. and Minister of Transportation and Communications et al.* (1976), 73 D.L.R. (3d) 18 (Ont. C.A.); *Bonanza Creek Hydraulic Concession v. The King*, [1908] 40 S.C.R. 281; *Stafford v. Minister of Health*, [1946] 1 K.B. 621; *L'Alliance Des Professeurs Catholiques de Montreal v. La Commission Des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal*, [1953] 4 D.L.R. 161 (S.C.C.); *Fairmount Investments* Ltd. v. Secretary of State for the Environment, [1976] 2 All E.R. 865 (H.L.); *Muliadi et al. v. Minister of Employment and Immigration et al.*, [1986] 18 Admin. L.R. 243 (Fed. C.A.); *Hecla Mining Co. of Canada v. Cominco Ltd.* (unreported decision of Federal Court of Appeal dated June 16, 1988); and *Re Apotex Inc. and Minister of Health of Ontario et al* (1989), 65 D.L.R. (4th) 622 (Ont. H.C.J.).

The impugned order affects property rights as well as other rights and obligations of people therefore the order falls into the category of those required to be made on a judicial or quasi-judicial basis; and all of the procedural rights of natural justice ought to have been adhered to by the Minister. That is, the objections raised by the applicant to the well, should not have been dismissed without a fair hearing in which the applicant had the opportunity to fully place its arguments before the Minister or the Board.

Legislative Context of the OGCA

A review of the OGCA and the OGC Regulations leaves little doubt that the Legislature intended that a person whose rights or interests are affected by a decision made by the Minister under the OGCA and OGC Regulations has a right to be heard.

Section 7 of the OGCA provides for the creation of a Board. Part VI of the

OGCA specifies the practice and procedure to be followed by the Board in respect to its hearings. Section 46(2) provides "hearings shall be open to the public and all persons interested may be heard". Section 48 provides that notice of the hearing must be given to the applicant.

The OGCA gives wide powers to the Board in respect of hearings. It states the Board has all of the powers that may be conferred upon commissioners under *The Public Inquiries Act*, R.S.S. 1978, c. P-38. Section 5 of the OGC Regulations governs the operation of the hearings and contains provisions which demonstrate an intention to foster adherence to the principles of fairness and natural justice.

It is interesting to note the OGCA contains several sections which authorize a hearing before the board. Of particular interest is ss. 49 and 50 which provide:

> **49**(1) On his own motion or on the written application of any interested person, the minister may order the board to hold a hearing with respect to any matter.
>
> (2) An applicant under subsection (1) shall furnish the minister with such data, information and material as he may require.
>
> **50.**--(1) A person affected by an order made by the minister without a recommendation by the board pursuant to a hearing or without a hearing by the board in respect of the matter to which the order relates may apply to the minister for a hearing.
>
> (2) An application under subsection (1) shall set forth the matters complained against and the reasons for the complaint.
>
> (3) If the minister does not amend or rescind the order complained against, he shall refer the application to the board for a hearing, and the board shall after the hearing make such recommendations to the minister as it deems fit.
>
> (4) Notwithstanding anything in this section, where the minister is of the opinion that the application is frivolous or vexatious, he may dismiss the application. [emphasis added]

By virtue of s. 50(1) any person who is affected by an order made by the Minister without a hearing is entitled to apply to the Minister for a hearing. This represents a statutory codification of the *audi alteram partem* rule and guarantees a hearing so long as the application is not frivolous or vexatious.

The result of ss. 49 and 50 is that virtually every decision or order made by the Minister under the OGCA that affects rights or interests of persons thereunder is made subject to the requirement of adherence to the principles of natural justice.

The provisions of the OGCA and the OGC Regulations leave little doubt that the Legislature intended that the Minister, in discharging his duties and deciding questions affecting the rights and interests of persons, must comply with the principles of natural justice. That is, the legislation intended adherence to the *audi alteram partem* rule.

It is common ground that the Board contemplated in s. 7 of the OGCA, referred to throughout the Act and particularly in ss. 49 and 50, does not exist and has not existed for many years. The result is there is no Board for the Minister to refer the application to for a hearing, as is contemplated by ss. 50(3). Therefore the Minister is left to amend or rescind the order or grant a hearing under ss. 50(1). This puts the Minister in the position where he must either have a Board in place to hold hearings or grant a hearing directly to the applicant.

When the applicant applied for a hearing on July 18, 1990 no hearing was convened. The Minister could not refer this matter to the Board because it did not exist. In an attempt to meet the requirements of s. 50 the Minister rescinded the first order, MA 82/90, and replaced it with the impugned order MRO 94/90.

It is argued by Gulf that where the order complained of (the first order) was rescinded or amended pursuant to ss. 50(3) that there is no requirement for a hearing. I think this position is correct. However, the applicant requested a hearing with respect to the impugned order which was denied. Counsel for Gulf contends once the first order was

objected to, then rescinded and replaced by a new order that s. 50 has no application with respect to the second order. It is argued that, there is then, no requirement pursuant to ss. 50(3) to amend or rescind the second order or have it referred to the Board. This argument must be rejected. Section 50(1) applies to any order made by the Minister which affects a person and that person is, then, entitled to a hearing.

Even if I am wrong in the manner in which I have interpreted the OGCA, the Court will imply a right to be heard unless the statute, in clear terms, takes that right away. This principle is well established. One need only refer to the case of *Homex, supra*, at pp. 1046-1047 where Dickson J. (as he was then) states:

> There is, of course, a long line of authority which establishes that before a public body can limit or abrogate the property rights of citizens, it must first give the individuals concerned an opportunity to be heard. This principle, of universal application, was established in the case of *Cooper v. Wandsworth Board of Works* [(1863), 14 C.B. (N.S.) 180]. Nor is it necessary for the legislature to provide explicitly for a hearing for a court to imply such right. On the contrary, where statutory bodies seek to limit property rights, the courts will imply a right to be heard unless there is an express declaration to the contrary: *Alliance des Professeurs catholiques de Montréal c. Commission des Relations ouvrières de la province de Québec et al.*, [[1953] 2 S.C.R. 140] at p. 154. As Kerwin J., as he then was, noted in that case, the legislature must be presumed to know that notice is required by the general rule. And it is therefore necessary for it to use explicit terms in order to absolve from the necessity of giving notice. See also *Re Watt and Registrar of Motor Vehicles* [(1957), 13 D.L.R. (2d) 124 (Man. Q.B.)]. [emphasis added]

The respondents argue natural justice was served because the applicant was heard through a series of letters and telephone calls between the Department and the applicant in which objections to the order were raised. The answer to this is that the letters and telephone calls did not amount to a fair hearing at common law. It certainly was not one which is contemplated by the OGCA and the OGC Regulations.

Gulf argues the duty to have a hearing pursuant to s. 50 only arises after the

order is in place, therefore it cannot be set aside. This argument is answered by s. 50 of the OGCA. It gives any person affected by the order a right to a hearing. At common law the denial of a right to a fair hearing, where one is required, always renders the decision invalid. It is also Gulf's position that if there had been a Board in place, or any other hearing, the decision of the Minister would have been the same because the Board could merely make recommendations to the Minister and the Minister makes the final decision.

These arguments were dealt with by LeDain J., in *Cardinal and Oswald v. Director of Kent Institution, supra,* at pp. 660-661:

> . . . It is a possible implication of their approach that they were of the view that given the Director's reasons for refusing to follow the recommendation of the Board a hearing by him of the appellants would not serve any useful purpose. Certainly a failure to afford a fair hearing, which is the very essence of the duty to act fairly, can never of itself be regarded as not of "sufficient substance" unless it be because of its perceived effect on the result or, in other words, the actual prejudice caused by it. If this be a correct view of the implications of the approach of the majority of the British Columbia Court of Appeal to the issue of procedural fairness in this case, I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing. [emphasis added]

CONCLUSION

The remedy sought by the applicant is the quashing of the Minister's order. Gulf claims this would require it to discontinue production from the well with enormous prejudicial consequences. There is no doubt Gulf would be adversely affected if the order

is quashed. On the other hand, the applicant claims it will suffer prejudicial consequences if the order is not quashed. In my view quashing the order will only delay production until lawful approval is obtained.

Gulf also claims the application was not brought on a timely basis, therefore, I should not exercise my discretion and quash the order. However, the motion to quash was launched three days after the date of the letter from the Minister's office denying the right to the hearing requested by the applicant in respect of the impugned order.

In view of the decision I have reached, it is not necessary for me to deal with the other grounds advanced by the applicant. For the reasons given, the application is granted and the Minister's order is quashed. Costs were not argued and no order is made for costs.